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No. 98-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT FALANGA and RONALD CHALKER,

Petitioners,

v.

STATE BAR OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a state bar rule prohibiting lawyers from paying for referrals directly and materially advances the State's substantial interest in ensuring the independent judgment of lawyers and eliminating the potential for conflicts of interest between lawyer and client such that there is a reasonable fit between the ends sought by the State Bar and the means chosen to obtain those ends.

II

Whether state bar rules that prohibit uninvited in-person solicitation by lawyers or a lawyer's agents or runners, as applied to circumstances involving a lawyer's uninvited in-person solicitation of unsophisticated, injured or distressed lay persons, directly and materially advances the State's substantial interest in (1) protecting the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct and (2) protecting the tranquility and privacy of personal injury victims and their loved ones against intrusive, unsolicited in-person contact from lawyers and the subsequent detrimental effects such conduct has on the public perception of the legal profession, such that there is a reasonable fit between the ends sought by the State Bar and the means chosen to obtain those ends.

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STATEMENT OF THE CASE

A. Introduction

The petition filed by Mr. Falanga mischaracterizes the issues presented to the trial court and the Eleventh Circuit. Having lost in the Eleventh Circuit, petitioners now contend that the in-person solicitation they seek merely involves (1) networking with business professionals and community leaders and (2) "occasionally" having nonlawyer employees contact potential clients by telephone. In fact, what petitioners actually want to do is best reflected in the trial testimony of Mr. Falanga and two chiropractors, discussed more fully below. It is noteworthy that after considering such evidence, the Eleventh Circuit stated, "[u]nlike the CPA in *Edenfield*, Falanga and Chalker do not contact 'prospective business clients.' " (Eleventh Circuit Opinion, Petition Appendix 1, at App. 17, *citing Edenfield v. Fane*, 507 U.S. 761 (1993)) Comparing the facts in this case to the facts in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Circuit Court stated

> the essential circumstances of *Ohralik* were that a lawyer engaged in 'uninvited' in-person solicitation of 'unsophisticated, injured, or distressed lay person[s].' *Edenfield*, 507 U.S. 774-75 (*quoting Ohralik*, 436 U.S. at 465-66). **To be sure, Falanga's and Chalker's circumstances fall squarely within this category of 'ambulance chasing.'**

(Eleventh Circuit Opinion, at App. 18) (emphasis added). The Eleventh Circuit found that the present case is closer to *Ohralik* than *Edenfield* and held that the challenged regulations governing uninvited in-person solicitation by lawyers are constitutional as applied to the "identity of the parties and the precise circumstances of the solicitation" at issue in this case.

Petitioners seek to avoid the accurate and appropriate decision by the Eleventh Circuit by recasting the type of solicitation they

desire and by attempting to resurrect a claim regarding restrictions on telephonic solicitation, which they abandoned at trial. This case does *not* involve personal solicitation by lawyers in a business context. Further, the Eleventh Circuit properly declined to decide the issue of "whether Georgia's restriction on telephonic solicitation violates Falanga's . . . commercial speech rights" because petitioners abandoned this claim at trial and the district court made no ruling on this matter. (Eleventh Circuit Opinion, at App. 18, n.26). Having abandoned this claim at trial, petitioners should not be permitted to raise this issue in their petition to this Court.

B. The Proceedings Below

The State Bar of Georgia ("State Bar"), respondent and defendant in the case below, is an administrative arm of the Supreme Court of Georgia. The State Bar is authorized by the Supreme Court of Georgia to investigate, discipline and make recommendations to the Supreme Court regarding discipline of members of the State Bar, and those licensed to practice law in Georgia, for violations of the Standards of Conduct set forth in Bar Rule 4-102. (R3-40-1) In June 1992, after receiving a sworn grievance from a chiropractor, the State Bar of Georgia began investigating Falanga and Chalker for breaches of several professional conduct standards. In an effort to stop the disciplinary proceedings, Falanga and Chalker filed a complaint in the United States District Court for the Northern District of Georgia. Falanga and Chalker alleged, among other things, that enforcement of these standards would violate their commercial speech rights under the First Amendment, as incorporated through the Fourteenth Amendment. After conducting a non-jury trial, the district court sustained as constitutional all but the restrictions on lawyers' in-person, uninvited solicitation, Standards 12, 16 (only as it refers to 12) and 17(a). Relying primarily upon the case of *Edenfield v. Fane*, 507 U.S. 761 (1993), the district court held that these three standards were unconstitutional and enjoined the State Bar from enforcing them against any lawyer.

Both parties appealed the district court's decision to the Eleventh Circuit. On August 19, 1998, the Eleventh Circuit entered an opinion declaring all of the challenged State Bar Rules constitutional. Petitioners filed a Suggestion of Rehearing En Banc, which was denied on November 18, 1998. This Petition for Writ of Certiorari was docketed with this Court on February 18, 1999. Petitioners challenge only the Circuit Court's finding that Standards 12, 13(b), 16 (but only as it relates to 12 and 13) and 17(a) are constitutional. Essentially, these standards prohibit lawyers from paying for referrals (a form of fee sharing) and prohibit uninvited in-personal solicitation by lawyers or by a lawyer's runners or agents.

STATEMENT OF FACTS

At the trial of this case, the State Bar presented extensive evidence from several sources to substantiate the Bar's contention that the harms targeted by the challenged regulations are real and that the regulations are reasonably tailored to the Bar's stated objectives. Those sources included: (1) William P. Smith, III, General Counsel for the State Bar of Georgia; (2) an independently-conducted study entitled "Consumer Reactions to Legal Services Advertising In The State of Georgia ("Georgia Survey"); (3) Dr. Kenneth Bernhardt, an expert in marketing and co-author of the Georgia Survey; (4) Jeffrey R. Davis, Assistant General Counsel; and (5) Karen Sturniolo, a recipient of lawyer advertising. Additionally, the testimony of Robert Falanga, petitioner and plaintiff in the case below, along with the testimony of two chiropractors who referred business to Mr. Falanga, provide substantial evidence that supports the State Bar's case.

A. Testimony of Robert Falanga and Two Chiropractors

Robert Falanga testified about the nature of his practice, his marketing plan and the general economic and educational background of his clients. Since 1984, Falanga's law practice has primarily focused upon representing plaintiffs in personal injury cases. (R7-489) Falanga described his clientele as generally poor

and uneducated. (R7-497) About eighty percent of his cases involve personal injuries due to automobile accidents. (R7-497)

Falanga and Chalker serve as the only lawyers in their five-office law firm headquartered in Atlanta, Georgia. (R7-497) Falanga and Chalker retain new clients through in-person, telephone and direct mail solicitation. (R7-498) (Eleventh Circuit Opinion, at App. 2) According to Falanga, he obtains the names and addresses of potential clients by copying police reports of automobile accidents that are maintained at the Department of Public Safety. (R7-499) Falanga testified that he sends out approximately 300 letters a week, and that this method of marketing generates about 8 to 12 new cases on a weekly basis. (R7-500)

Mr. Falanga testified that approximately twenty-five percent of his clients were referred to him by chiropractors. (R5-500, 501) According to Falanga, these chiropractors typically refer their patients to more than one attorney. (R5-502) Falanga testified that as part of his "marketing plan" he would "network" with chiropractors. (R5-501, 502) Although Falanga denied "paying" these doctors for referrals, he testified that he would provide them with free legal advice regarding various matters. (R5-501, 502; 521) Falanga would ask the chiropractor to refer potential clients to him and Falanga would agree to refer his clients to the chiropractor. (R6-549) In order to keep the flow of referrals coming, Falanga testified that he would make sure that the doctor was happy with how his firm was handling the cases that had been referred. (R5-502) Falanga recognized that part of "making the doctor happy" included ensuring that the doctor was paid for the services rendered to the patient who had been referred. (District Court Order ("Order"), Supplemental Appendix, p. 23, at ¶ 45) Often the only payment a chiropractor receives for the treatment of a patient (who is also the client to Falanga) is paid from any settlement for medical bills reached by Falanga. *Id.*

Two chiropractors testified for the plaintiffs about this practice from the doctor's perspective. Both chiropractors testified that

they referred patients to Falanga (R6-549, 559) The chiropractors admitted that their bills had been challenged on occasion as excessive by insurance companies. (R6-551, 552) In some cases, the insurance company refused to pay for the charges or negotiated with the doctor to reduce the charges. (R6-552) Falanga provided advice or assistance to chiropractors when they encountered problems getting paid by insurance companies. (R5-521)

B. Evidence Presented by the State Bar

The State Bar's general counsel, William Smith, testified that Standard 13(b), which prohibits lawyers from paying for referrals, serves to promote the State's interest in assuring the independence of lawyers by minimizing the number of situations in which lawyers will be motivated by economic interest incentives rather than by their client's best interest. (R8-664) The conduct prohibited under Standard 13(b) is a form of fee sharing. Mr. Smith testified about the practice of using "runners" to acquire personal injury clients. These "runners" are individuals who are paid for referring potential clients. Mr. Smith testified that during the twelve year period that he has been General Counsel, he is aware of consumer complaints regarding the aggressive tactics of runners. (R9-690) Smith explained that runners, motivated by personal financial gain, have every incentive to make misrepresentations to the potential client. (R8-663, 664) The Bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. Thus, the only way to protect the public from the overreaching of these runners is to prohibit attorneys from engaging in the practice of paying for referrals. (Order, Supp. App., p. 25, ¶ 48)

Additionally, the State Bar's general counsel and assistant general counsel provided anecdotal evidence relaying the public's complaints about in-person, telephonic and direct mail solicitation. (Eleventh Circuit Opinion, at App. 19) The State Bar's general counsel, William P. Smith, III testified that based upon his experiences during the twelve years he has served as General Counsel, members of the public voiced dissatisfaction with

uninvited in-person solicitation because such conduct takes on the aura of an imperative. (R6-158) When an individual is contacted directly by a lawyer, there is an implication that the reason for the contact has something to do with the law, and the individual may feel that she has to speak with the lawyer in order to determine the purpose of the communication. (R6-169) An accident victim herself testified about the intrusive nature of solicitation that Falanga himself initiated. (Eleventh Circuit Opinion, at App. 19)

The State Bar presented the results of an independently-conducted study by Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt, entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia (Defendant's exhibit 7, hereinafter "Georgia Survey") Dr. Kenneth Bernhardt, Chairman of the Department of Marketing at Georgia State University, testified for the State Bar. According to Dr. Bernhardt, the results of the Georgia Survey demonstrate that, while consumers generally favor legal advertising, the more intrusive the advertising method used, the more negative the attitude towards attorneys who advertise in that medium. (R3-40-7; R6-263)

The Georgia Survey demonstrates that unsophisticated, less educated and poorer consumers are more susceptible to overreaching and undue influence in circumstances involving personal solicitation by lawyers. (Georgia Survey, p. 29) The Georgia Survey also established that less educated consumers, as well as consumers with little personal knowledge of lawyers, are more susceptible to misunderstanding communications about legal services. (Georgia Survey, pp. 172, 176) Significantly, the Georgia Survey demonstrates that these same consumers are more likely to *rely* upon lawyer advertising for the selection of a lawyer. (Georgia Survey, p. 56)

The results of the survey show that about half of the respondents agreed that "Lawyers track down injured people and try to talk them into taking legal action." (Georgia Survey, p. 28)

With respect to the attorney selection process, "referral" was the dominant method used by respondents in selecting or learning about their most recently used attorney. (Georgia Survey, p. 56) Those most likely to consider mass media advertising as important in selecting an attorney were aged 18-24 with high school education or less, incomes under $15,000 and with little knowledge of attorneys or the legal system. (Georgia Survey, p. 56; *see also* Order, Supp. App., p. 9 at ¶ 15)

REASONS FOR DENYING THE WRIT

The petition's largely unsupported factual allegations regarding the circumstances of solicitation at issue in this case mischaracterize the issues presented to the trial court and the Eleventh Circuit and do not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

I.

THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE RESTRICTIONS IN STANDARD 13(b) SERVE TO ADVANCE THE STATE'S SUBSTANTIAL INTEREST IN PROMOTING THE INDEPENDENT JUDGEMENT OF LAWYERS AND PROHIBITING THE PRACTICE OF LAW BY A LAYMAN.

Standard 13(b) prohibits lawyers from paying for referrals. The conduct prohibited under Standard 13(b) is a form of fee sharing. Because this standard prohibits conduct ("a lawyer shall not compensate"), this regulation does not fall within the framework of commercial speech. Even if this standard is considered to be a regulation of commercial speech, however, the State Bar provided sufficient evidence to justify this regulation. Mr. Smith testified that Standard 13(b) serves to advance the State's substantial interest in promoting the independent judgment of lawyers and prohibiting the practice of law by a layman. (R8-664) *See also* ABA Code of Professional Responsibility, EC 3-3

("Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman".) *See, e.g., Lawline v. American Bar Ass'n*, 738 F. Supp. 288 (1990), *aff'd*, 956 F.2d 1378 (1992), *cert. denied*, 114 S. Ct. 551 (1993) ("prohibitions on aiding nonlawyers in the unauthorized practice of law and on forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law do not violate any First Amendment guarantees.")

The State Bar presented evidence regarding the use of "runners" to acquire personal injury clients. (R9-690) The district court noted that " '[r]unners' are individuals who are paid for referring potential clients. These runners, who are motivated by personal financial gain, have every incentive to make misrepresentations to the potential client in order to gain the client's business for the attorney, and thus, keep the attorney happy and willing to pay the runner." (Order, Supp. App., p. 25, ¶ 48) The State Bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. Thus, the only way to protect the public from the overreaching of these runners is to prohibit attorneys from engaging in the practice of paying for referrals. The district court noted that

> prohibiting lawyers from engaging in the practice of paying for referrals is a reasonable method of preventing the harm caused by the overreaching of certain runners, which has prompted complaints to the Bar by the public.

(Order, Supp. App., p. 25, ¶ 48)

Contrary to assertions in the petition, Mr. Falanga's relationship with referring chiropractors was not limited to "networking" with doctors and providing information regarding his background and law practice. Although Mr. Falanga denied "paying" chiropractors for referrals, he testified that he would provide them with free legal advice if the referring doctor

encountered any problems with getting paid by the insurance company. (R7-501, 502) Two chiropractors testified that their bills for medical care had been challenged on occasion as excessive by insurance companies. (R7-551, 552) In some cases, the insurance company refused to pay for the charges or negotiated with the doctor to reduce the charges. (R7-551, 552)

Common sense dictates that in cases where a chiropractor's bill is to be paid out of settlement proceeds, an attorney who has benefitted from the doctor's referrals, may not be motivated to scrutinize the doctor's bill. (Order, Supp. App., p. 24, ¶¶ 47-48) An attorney, dependent upon chiropractors' referrals for a substantial portion of his practice, clearly has a conflict between his client's best interest and his own in continuing his relationship with the doctors. As Mr. Falanga testified, the attorney is well aware that the chiropractor can refer patients to other attorneys should the chiropractor become unhappy with the attorney's handling of the matter.

II.

THE ELEVENTH CIRCUIT CORRECTLY HELD THAT RULES BANNING UNINVITED IN-PERSON SOLICITATION BY LAWYERS ARE CONSTITUTIONAL

The Eleventh Circuit correctly upheld the challenged rules restricting uninvited in-person solicitation by lawyers and lawyers' agents and runners (Standards 12, 16 and 17(a)). The circuit court held that the State Bar was justified in relying on the Court's findings of fact and conclusions of law in *Ohralik v. Ohio State Bar Association*, "because for all intents and purposes this case is *Ohralik*." (Eleventh Circuit Opinion, at App. 19) The circuit court further found that the challenged rules are constitutional under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

In reversing the district court's decision that three of the Standards were unconstitutional, the Eleventh Circuit noted that

the district court had improperly charged the State Bar with the wrong burden of proof. The district court found that the challenged regulations failed because "the Bar . . . failed to demonstrate that [the harms associated with in-person solicitation] are present in *all* circumstances." The Eleventh Circuit noted that

> [i]n an as-applied challenge, however, the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation.

(Eleventh Circuit Opinion, at App. 27, n.24, *citing*, *Edenfield v. Fane*, 507 U.S. 761, 774 (1993))

A. The State Bar established that under the circumstances in the present case, as in *Ohralik*, the challenged regulations are justified

Under *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, the State Bar is *not* required to show in every instance of personal solicitation that the solicited individual will be harmed. Rather, the State Bar must demonstrate that, in light of the general circumstances presented in the case, the Bar's perception of the potential for harm is well founded. *Ohralik*, 436 U.S. at 464.

In *Ohralik*, the prophylactic ban on uninvited in-person solicitation by lawyers was deemed constitutional under the general circumstances presented in the case. The *Ohralik* Court reasoned that an "unsophisticated, injured, or distressed lay person may place his trust with a lawyer . . . simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Id.* at 465. Additionally, the *Ohralik* Court recognized that generally, lay persons are unfamiliar with the law, with how legal services are procured, and with the typical arrangements between lawyer and client. *Id.* at 465, n.24. The court found such circumstances "inherently conducive to overreaching and other forms of misconduct" and therefore, the "State has a strong interest in adopting and enforcing rules of conduct designed

to protect the public from harmful solicitation whom it has licensed." *Id.* at 464.

The Eleventh Circuit recognized that the identities of the parties and the circumstances of solicitation in the present case closely parallel the facts in *Ohralik*. (Eleventh Circuit Opinion, at App. 17) Petitioners are attorneys who primarily engage

> in the practice of law that involves representing clients who have personal injury claims or death claims that must be brought against others legally responsible for payment of damages for those claims.

(R1-1-2) In their complaint, petitioners asserted that they would like to have direct personal contact with potential clients who have not first approached them. They also would like to give advice to potential clients, and then be hired, even though such potential clients are *not* close friends, relatives or former clients. (R1-1-6)

Falanga testified that generally his clients are poor and uneducated. (R7-497) Falanga testified that his marketing plan includes obtaining the names and addresses of potential clients by copying police reports of automobile accidents. He uses this information to send out approximately 300 letters per week. (R7-499) Thus, the general circumstances of solicitation in the present case, involving in-person solicitation by a lawyer of potential clients who are "poor, uneducated" and have recently been involved in a trauma, such as an automobile accident, are similar to the circumstances of solicitation considered by the Court in *Ohralik*. (Eleventh Circuit Opinion, at App. 17) Rejecting petitioners' reliance on *Edenfield*, the Eleventh Circuit correctly noted:

> **[p]lainly, this case is closer to *Ohralik* than *Edenfield*.** Georgia and Ohio restrict lawyers' in-person, uninvited solicitation through substantially identical means. Falanga and Chalker, like Ohralik, practice personal injury law. All three lawyers (and/or their agents) solicit automobile accident victims face-to-face. Unlike the

> CPA in *Edenfield*, Falanga and Chalker do not contact "prospective *business* clients." 507 U.S. at 771 (emphasis added). Rather, most of their clients are poor and uneducated individuals. Thus, although Falanga's and Chalker's conduct may not be as egregious as Ohralik's, they cannot seriously contend that *Edenfield* saves their case. *See Ohralik*, 436 U.S. at 468 ("The absence of explicit proof or findings of harm or injury is immaterial.").

(Eleventh Circuit Opinion, at App. 17) (emphasis added)

B. The Eleventh Circuit correctly held that the challenged regulations passed Constitutional muster under the *Central Hudson* test

Restrictions on commercial speech are analyzed under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). Under the *Central Hudson* test, State regulation of commercial speech that is neither misleading nor connected to unlawful activity is permissible if: (1) the State asserts a substantial interest in support of its regulation; (2) the State establishes that the restriction directly and materially advances that interest; and (3) the regulation must be narrowly drawn. *Id.*, 447 U.S. at 564-65. Applying the *Central Hudson* test to the instant case, the Eleventh Circuit held that

> the State Bar presented sufficient evidence as a matter of law to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree . . . Georgia's prophylactic ban on in-person solicitation, whether the actor be a lawyer or a non-lawyer, stands in reasonable proportion to the interest served

(Eleventh Circuit Opinion, at App. 28)

The State Bar's general counsel and assistant general counsel provided anecdotal evidence, regarding the public's complaints about in-person, telephonic and direct mail solicitation. (Eleventh Circuit Opinion, at App. 28) Additionally, the State Bar presented the testimony of an accident victim who testified about the intrusive nature of solicitation that Falanga had initiated. (Eleventh Circuit Opinion, at App. 19)

The State Bar presented evidence of an independently-conducted study entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia." While the study focused on television advertising, both the district court and the circuit court found that some of the study's conclusions are relevant to in-person solicitation. (Eleventh Circuit Opinion, at App. 19-20)

The Eleventh Circuit recognized that the Georgia Survey "posits that the more intrusive the advertising method, the more negative the public's view of lawyers." (Eleventh Circuit Opinion, at App. 20) The circuit court further noted that the Georgia Survey demonstrated that "[o]verall, the highest percentage of respondents agreed with the proposition that 'lawyers track down injured people and try to talk them into taking legal action.' " (Eleventh Circuit Opinion, at App. 20) The Circuit Court found it significant that the study showed that consumers "[o]verwhelmingly prefer to choose a lawyer through methods that they control, that is references from family, friends, co-workers, etc." (Eleventh Circuit Opinion, at App. 20) Thus, the Circuit Court correctly found that

> [f]rom this information, the State Bar could reasonably infer that the majority of legal service consumers view in-person solicitation — whether through lawyers or their agents — as unduly intrusive, destructive to the court system and deserving of regulation.

Id.

The Georgia Survey demonstrates that unsophisticated, less educated and poorer consumers are more susceptible to

overreaching and undue influence in circumstances involving personal solicitation by lawyers. (Georgia Survey, p. 29) The Georgia Survey also established that less educated consumers, as well as consumers with little personal knowledge of lawyers, are more susceptible to misunderstanding communications about legal services. (Georgia Survey, pp. 172, 176) Significantly, the Georgia Survey demonstrates that these same consumers are more likely to *rely* upon lawyer advertising for the selection of a lawyer. (Georgia Survey, p. 56) The Eleventh Circuit held that State Bar is *not* required to prove that every consumer will be harmed by such personal solicitation. As in *Ohralik*, under the circumstances of solicitation at issue in the present case, "**it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.**" *Edenfield*, 113 S. Ct. at 1802, *citing Ohralik*, 436 U.S. at 465-466. (emphasis added)

The Eleventh Circuit noted that history, consensus and "common sense" support the State Bar's position. (Eleventh Circuit Opinion, at App. pp. 20-27) The Circuit Court correctly found that in addition to the anecdotal and study evidence presented by the State Bar, the long history of the regulations proscribing in-person solicitation "cuts in favor of the State Bar." *(Id.* at App. 20) Noting that "proscriptions on in-person solicitation have been a part of the State Bar's regulatory scheme since its creation in 1963," the Circuit Court rejected Mr. Falanga's argument that the State Bar's evidence lacked specificity on the extent of the harm associated with in-person solicitation. In light of the long history of the regulation, the lack of evidence regarding actual harm from in-person solicitation was not surprising. *Id.* The State Bar presented extensive evidence of the harm that would exist, but for the challenged legislation. *See Sciarrino v. City of Key West, Fla.*, 83 F.3d 364, 367 (11th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997).

The Circuit Court noted that the strong consensus amongst the states banning in-person, uninvited solicitation for pecuniary gain strongly supported the State Bar's position. "No less than 32

states proscribe in-person solicitation in the same or similar manner." (Eleventh Circuit Opinion, at App. 22) "Only four jurisdictions — the District of Columbia, Maine, Montana and North Dakota — liberally permit in-person solicitation, but not without limitation." (*Id.* at App. 24-25)

With respect to the State Bar's reliance upon "simple common sense," the Eleventh Circuit agreed that "we need go no further than the four-corners of *Ohralik*." (Eleventh Circuit Opinion, at App. 26) The Circuit Court cited *Ohralik* for the principle:

> unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

(Eleventh Circuit Opinion, at App. 26 *citing Ohralik*, 436 U.S. at 454, 457-58 (internal citations and footnotes omitted))

C. The challenged regulations banning uninvited in-person solicitation by lawyers must be considered in light of alternate channels of communication

In *44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), this Court recognized that an important factor in the First Amendment analysis of commercial speech regulations is whether additional available channels of communication exist. 116 S. Ct. at 1507. Accordingly, the commercial speech regulations at issue in the present case, must be considered in light of the "channels of communication open to" Georgia lawyers. Georgia lawyers are

permitted to advertise on prime-time television and radio, in newspapers, on billboards, in the Yellow Pages and other media.

Furthermore, the challenged regulations do not create an absolute ban on lawyer in-person solicitation. Nothing in the rules prohibit an attorney from sending potential clients written communications inviting the potential client to contact the lawyer if the individual would be interested in a personal presentation. (Eleventh Circuit Opinion, at App. 29)

The only circumstances of solicitation presented in this case involve lawyers' solicitation of potential clients who are generally poorer, less educated and who have recently suffered some trauma. In the case below, there was no testimony by any attorney who sought personally to solicit clients in a business context. At trial, the petitioners abandoned their claim that the regulations unconstitutionally prohibited in-person telephone solicitation of potential clients and the Eleventh Circuit declined to consider this issue on appeal. Thus, there is no basis for this Court to conclude that the challenged regulations, which permit invited personal solicitation, are overly broad.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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